

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

Antonio Gonzalez,)	CASE NO. 3:11 CV 2500/3:12 CV 1636
)	
Petitioner,)	JUDGE PATRICIA A. GAUGHAN
)	
vs.)	
)	
Keith Smith, Warden,)	<u>Memorandum of Opinion and Order</u>
)	
Respondent.)	

Introduction

This matter is before the Court upon the Report and Recommendation of Magistrate Judge Kenneth McHargh (Doc. 8 in Case No. 3:11 CV 2500 and Doc. 12 in Case No. 3:12 CV 1636) which recommends denial of the Petitions for Writ of Habeas Corpus pending before the Court. Petitioner filed Objections to the Report and Recommendation. For the following reasons, the Report and Recommendation is ACCEPTED.

Standard of Review

Rule 8(b) of the Rules Governing Section 2254 Cases in the United States District Courts provides, “The judge must determine *de novo* any proposed finding or

recommendation to which objection is made. The judge may accept, reject, or modify any proposed finding or recommendation.”

Discussion

Petitioner filed two Petitions for Writ of Habeas Corpus challenging his 2010 convictions for felonious assault and rape. The Petitions have been consolidated, and one Report and Recommendation was filed (docketed in each case). The Magistrate Judge found that both Petitions were not timely filed within the one year limitations period set forth by the AEDPA.

The Magistrate Judge reasoned as follows. The state court of appeals affirmed the trial court’s resentencing judgment on November 21, 2008. Petitioner did not seek timely review by the Ohio Supreme Court within 45 days, making his conviction final as of January 5, 2009. The one year limitations period began to run on that date, making his Petition due on January 5, 2010. Petitioner, however, filed a motion for collateral relief on August 31, 2009, stopping the running of the one year period. The period was tolled until June 22, 2011, when the Ohio Supreme Court denied leave to appeal the appellate court’s ruling affirming the trial court on the collateral motion. At that point, the limitations period resumed running for the 127 days left in the one year stretch, expiring on October 27, 2011. As the Petitions were not filed until November 17, 2011 and June 25, 2012, they are untimely. The Magistrate Judge rejected petitioner’s assertion that his conviction was actually not “final” until June 22, 2011, because before that time his conviction and the prior appellate rulings were “void.”

Petitioner’s Objections again maintain that his case did not actually become final until June 2011 because his judgments were void up until that time based on Ohio Supreme Court

decisions interpreting judgments of conviction as final orders. The Court agrees with the Magistrate Judge's rejection of petitioner's line of argument in this regard and, consequently, finds that the Petitions are untimely.

For the reasons stated above, and those stated in the Report and Recommendation which is incorporated herein, the Petitions for Writ of Habeas Corpus are denied as untimely.

Conclusion

Accordingly, the Report and Recommendation is accepted. The Petitions for Writ of Habeas Corpus are dismissed. Furthermore, for the reasons stated herein and in the Report and Recommendation, the Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from this decision could not be taken in good faith, and that there is no basis upon which to issue a certificate of appealability. 28 U.S.C. § 2253(c); Fed.R.App.P. 22(b).

IT IS SO ORDERED.

/s/ Patricia A. Gaughan
PATRICIA A. GAUGHAN
United States District Judge

Dated: 5/10/13